

# **Exhibit E**

06TAASUTC Conference

1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 STEPHANIE SUTHERLAND,

4 Plaintiff,

5 v. 10 CV 3332 (KMW)

6 ERNST & YOUNG,

7 Defendant.

8 -----x

8 New York, N.Y.

9 June 29, 2010

9 3:00 p.m.

10 Before:

11 HON. KIMBA M. WOOD,

12 District Judge

13 APPEARANCES

14 FARUQI & FARUQI, LLP

15 Attorneys for Plaintiff Mansberger

15 BY: GERALD WELLS, III

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16 FOLKENFLIK & MCGERITY

17 Attorneys for Plaintiff Sutherland

17 BY: MAX FOLKENFLIK

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18 AKIN GUMP STRAUSS HAUER & FELD, LLP

19 Attorneys for Defendant Ernst & Young

19 BY: JOEL M. COHN

20 DANIEL L. NASH

20 ESTELA DIAZ

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1 (Case called)

2 MR. FOLKENFLIK: Good afternoon, your Honor.

3 Max Folkenflik, for Folkenflik & McGerity, for  
4 plaintiffs, punitive class.

5 MR. WELLS: Gerald Wells, on behalf of plaintiff,  
6 Brian Mansberger.

7 MR. COHN: Joel Cohn, from Akin Gump Strauss Hauer &  
8 Feld, on behalf of Ernst & Young.

9 MR. NASH: Daniel Nash, on behalf of Ernst & Young.

10 MS. ESTELA DIAZ: Good afternoon, your Honor.

11 Estela Diaz, on behalf of Ernst & Young.

12 THE COURT: Good afternoon.

13 This conference has been called for a narrow purpose.  
14 First is to learn from counsel in the Mansberger case whether  
15 there is any objection to having the case deemed related to the  
16 Sutherland action.

17 MR. WELLS: Your Honor, on behalf of the plaintiff, we  
18 don't believe whether there is any issue with having these  
19 cases deemed related.

20 THE COURT: Does that mean yes or no; you agree?

21 MR. WELLS: Yes, your Honor.

22 THE COURT: Have you had a chance to look over the  
23 schedule that I set in the Sutherland case?

24 MR. WELLS: I have, your Honor. And due to some  
25 travel conflicting between myself and Mr. Folkenflik we've

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1 begun at least caucusing regarding whether or not above and  
2 beyond the cases being related if any further issue should be  
3 addressed. And while discussions have begun, your Honor, we'd  
4 like at least from plaintiff Brian Master we'd would like some  
5 additional time to bring those discussions to fruition and we'd  
6 like approximately two weeks. I think that time could be  
7 accomplished and state whether or not the schedule that is set  
8 the forth in the Sutherland matter can be adopted for the  
9 Mansberger matter where the cases can be consolidated.

10 THE COURT: All right. When you say "or can be  
11 consolidated".

12 MR. WELLS: I'm sorry, your Honor. And whether or not  
13 they should be consolidated.

14 THE COURT: Well, if they're deemed related they are  
15 consolidated. They won't necessarily be adjudicated at the  
16 same time but they will be dealt with by the same judge.

17 MR. WELLS: Correct, your Honor, but consolidation for  
18 all purposes.

19 THE COURT: Okay. All right. Very good. What date  
20 do you propose?

21 MR. WELLS: Your Honor, two weeks from today if that's  
22 amenable to the Court.

23 THE COURT: That's fine. That would be July 6.

24 MR. WELLS: Very good, your Honor.

25 THE COURT: No. I wasn't counting right. That would

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1 give you only one week. I will not be here the weeks of the  
2 12th and the 18th. Would you be available July 7 or is that  
3 too soon?

4 MR. FOLKENFLIK: Your Honor, I think that might  
5 provide sufficient time, although, with the holiday it may  
6 cause some delays. Although, telephones work on holidays as  
7 well.

8 Just so I can make clear our understanding and  
9 position, we believe the two cases should be handled by the  
10 same judge because whether or not they're consolidated for  
11 discovery or certification or even trial similar issues are  
12 going to arise time and again and a single judicial voice makes  
13 sense.

14 With respect to the way in which we're proceeding now,  
15 I think I am clear and I think Mr. Wells agrees, but he can  
16 tell you if he doesn't, that for the moment the cases should be  
17 proceeding on their own tracks. And by that I mean whatever  
18 discovery I may take or meetings I may have with opposing  
19 counsel is not dependent upon Mr. Wells being ready to do that  
20 same discovery or meetings. Although, I certainly would be  
21 happy to invite him because that would seem efficient into any  
22 discovery I choose to take. I am taking a deposition on the  
23 14th in the Hoe case which pursuant to stipulation will be  
24 usable in this case. I am taking a deposition on the 19th in  
25 the Hoe case which pursuant to stipulation will be used in this

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1 case. The 19th is in California and the 14th is here in New  
2 York.

3 Also, there are meetings to be held between counsel as  
4 your Honor ordered and that's an issue I want to raise because  
5 there are some issues with regard to that that the defendants  
6 have raised.

7 And I want to address other matters to expeditiously  
8 move this case toward a certification decision on Rule 23 and a  
9 conditional certification for the purposes of Section 216 (B)  
10 notice under the FLSA.

11 With respect to conditional certification I may be  
12 ready much sooner than November 15th and, obviously, as your  
13 Honor is aware, statutes of limitation continue to run. We  
14 want to send out that notice at the earliest possible moment.  
15 Conditional certification as Mr. Cohn pointed out last time is  
16 very minimal standard showing. We think we can make that  
17 showing if the defendants cooperate with us and provide us with  
18 some answers that I think are inarguable as quickly as we hear  
19 from them, answers such as whether national manuals providing  
20 for audit responsibilities apply nationwide, whether the  
21 training programs that are given to staff one and two with  
22 respect to audit responsibilities are uniform nationwide. With  
23 respect to whether the training responsibilities with respect  
24 to seniors one or two, the level above which is in Mr. Well's  
25 case and not ours are applicable nationwide. And the reason I

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1 raise that is as our expert we're about to retain has indicated  
2 those materials may provide an insight as to what is different  
3 between staff one and two and senior one and two on the audit  
4 programs. I think we can develop a more than a minimal showing  
5 that our class, staff one and two, are treated uniformly  
6 sufficiently to get a conditional certification of very quick  
7 order.

8 So while that might involve some duplication of  
9 expense in FLSA notices, if Mr. Wells were to at a later point  
10 bring an FLSA point which is not in the case at this moment, I  
11 don't think we should delay the notice because of any such  
12 potential future contingency and we should do it as quickly as  
13 possible.

14 THE COURT: All right. Do you wish to be heard  
15 further on that, Mr. Wells?

16 MR. WELLS: Yes, your Honor.

17 Your Honor, I have no intention of in any way delaying  
18 the depositions that Mr. Folkenflik has scheduled for the Hoe  
19 case which to my knowledge regards California claims alone,  
20 provided however that defendants can make those depositions  
21 transcripts available to myself and my co-counsel as well,  
22 including the caveat that if for whatever reason we need  
23 additional information that we're not in any way precluded from  
24 taking our own depositions in our case should these two cases  
25 not be consolidated for all purposes.

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1 THE COURT: Thank you.

2 Mr. Cohn?

3 MR. COHN: Yes, your Honor. About our position?

4 THE COURT: Well, do you wish to be heard on any of  
5 the matters that have been raised either by me or  
6 Mr. Folkenflik?

7 MR. COHN: Yes, a number of matters, your Honor.

8 First of all, we believe that now that the cases are  
9 related we believe that they should be consolidated under Rule  
10 42 at least for purposes of class certification. This was the  
11 same, this is the same arrangement that Judge Fogle has ordered  
12 in the California litigation and Mr. Folkenflik himself has  
13 agreed to that procedure. So we don't see any reason at all to  
14 deviate from that approach.

15 Now, it is our understanding that you have the  
16 authority to sua sponte -- the consolidation or we'll be happy  
17 to brief the issue but we do think that we satisfy all of the  
18 requirements of Rule 42 under established Second Circuit  
19 authority and we have authority if you would like to hear from  
20 us on that issue. So we do think the cases should be  
21 consolidated.

22 With regard to the briefing schedule that the Court  
23 has entered, we spent several hours on that last time and we  
24 think that the parties should now adhere to that. We don't  
25 think it's appropriate to be deviating by having Mr. Folkenflik

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1 get ahead of that schedule with some type of motion under the  
2 Fair Labor Standards Act. So, the Court set a schedule. We  
3 had a full discussion of it. And now that has been set in  
4 place and so we think we should abide by that.

5 The last point I want to make and this is an important  
6 point from our perspective. Listening to Mr. Folkenflik one  
7 would be led to believe that we are embarking on these issues  
8 for the first time. Whether or not as he says audits are the  
9 same, whether staff ones and staff twos do this or do that, the  
10 California litigation which these plaintiffs and in particular  
11 plaintiff's counsel are trying to run away from, and let's be  
12 perfectly clear about this, as Mr. Folkenflik stated last time  
13 the reason the Richards was filed was because they didn't like  
14 what was going on in Judge Fogle's courtroom.

15 Now, Richards has been consolidated with Hoe and so  
16 now they're coming to New York. We have had five years of  
17 discovery. The questions that Mr. Folkenflik is asking as  
18 though he doesn't have a clue have been subject to discovery  
19 for five years. He himself on the record last time represented  
20 to the Court about 11 sets of interrogatories, numerous  
21 depositions and I don't remember, 50,000 pages of documents,  
22 and he doesn't know the answers to these questions?

23 Respectfully, your Honor, our client also has rights  
24 that deserve to be represented and enforced and we are  
25 certainly in agreement with the Court that this should be made

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1 efficient to the extent possible but these issues really need  
2 to be looked at in the proper context. So, yes, the cases are  
3 related. Yes, we think the cases should be consolidated and we  
4 think the Court is certainly in a position today to order that.  
5 If not, we'll be happy to brief it. And then once that occurs,  
6 your Honor, as I mentioned last time, we are actively  
7 considering whether to file a motion with the Court seeking to  
8 transfer the actions after they have been consolidated to Judge  
9 Fogle's courtroom where in all likelihood these claims should  
10 have been raised in the first instance.

11 THE COURT: All right. When do you expect to file  
12 your motion to transfer?

13 MR. COHN: We could -- well, we could file that  
14 probably within a few weeks. I don't think it would take us  
15 any longer than that to prepare it.

16 THE COURT: Okay. Mr. Folkenflik?

17 MR. FOLKENFLIK: Yes, your Honor, if I may respond  
18 brief.

19 THE COURT: Let me just note one thing. Today we are  
20 discussing consolidation and whether that needs to be briefed  
21 and whether Mr. Wells should be given two weeks to consider it  
22 and then we would all come back and discuss it. So we're  
23 discussing right now whether to consolidate immediately,  
24 whether there should be a two week discussion period or three  
25 whether there should be briefing.

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1 Third, rather the second main point as I understand it  
2 is whether you intend to adhere to the briefing schedule we set  
3 last time.

4 MR. FOLKENFLIK: Absolutely, your Honor.

5 THE COURT: Then why are we talking about that?

6 MR. FOLKENFLIK: Well, your Honor set a briefing  
7 schedule that I should move no later than November 15, 2010 for  
8 conditional certification under the FLSA. I just raised the  
9 possibly that we might move sooner which is no later. And that  
10 is the briefing schedule. If your Honor chooses to not allow  
11 me to move until November 15th, that's fine, but I don't think  
12 that would be necessarily either expeditious or appropriate.

13 THE COURT: Well, I have almost never told someone  
14 they cannot file a motion at a particular time. In fact, no  
15 such instance comes to mind.

16 Okay. With respect to consolidation I suggest this:

17 Mr. Wells, can you file within one week any opposition  
18 to consolidation of these actions?

19 MR. WELLS: Yes, your Honor.

20 THE COURT: Okay. So we will assume that a motion has  
21 been made now for consolidation for the reasons that have been  
22 amply set forth in the record at this conference and at the  
23 earlier conference, the transcript of which is available to  
24 Mr. Wells.

25 Mr. Wells will respond to that motion within one week

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1 and defense counsel shall respond within one week thereafter.

2 MR. FOLKENFLIK: Your Honor, I take it I may be heard  
3 as well in the one week on consolidation?

4 THE COURT: Yes. Mr. Wells seemed to indicate in what  
5 he said to me that he would be discussing this with you --

6 MR. FOLKENFLIK: Absolutely.

7 THE COURT: -- in the next two weeks.

8 MR. FOLKENFLIK: But we may reach different positions.

9 THE COURT: You certainly may be heard on it, yes. So  
10 you should coordinate with one another. And Mr. Wells should  
11 let you know whether he agrees to consolidation. If you oppose  
12 consolidation you would need to file within, let's say, ten  
13 business days of today.

14 MR. FOLKENFLIK: That's fine, your Honor.

15 THE COURT: Okay.

16 MR. FOLKENFLIK: And, your Honor, just so your Honor  
17 understands my position with consolidation is there's a  
18 difference between discovery and class certification.

19 THE COURT: I understand and I don't think we need to  
20 get into all of that now. I think everyone understands the  
21 distinctions.

22 MR. WELLS: Your Honor, just a point of clarification  
23 for myself. Do I understand the defendant's position that if my  
24 client's case which asserts New York State claims only and  
25 therefore in no way could ever be brought in California if

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1 these matters are consolidated defense is intending to transfer  
2 my case out to California?

3 THE COURT: We discussed last time the unlikelihood of  
4 that.

5 What is your view, Mr. Cohn?

6 MR. COHN: Your Honor, we think that this, that the  
7 New York claim, Mr. Mansberger's claim, could have been filed  
8 in California under CAFA. We can certainly brief that issue if  
9 the Court --

10 THE COURT: All right. Let's then alter the briefing  
11 schedule. Thank you for bringing that to my attention Mr,  
12 Wells.

13 Mr. Cohn, can you brief within one week whether the  
14 New York action could have been brought in California? That  
15 will enable Mr. Wells to know what position he should take on  
16 consolidation. If it could not have been brought in California  
17 then that decision on consolidation should probably await the  
18 decision on any transfer motion. There is no point in  
19 consolidating a case with another case that's going to a state  
20 where it could not have been brought.

21 MR. COHN: I think I understand. Let me make sure I  
22 am clear.

23 We believe that the Mansberger and Sutherland actions  
24 should be consolidated under Rule 42 in this court. The  
25 transfer issue is a separate issue.

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1 THE COURT: Of course.

2 MR. COHN: And we can, of course, also brief a week  
3 from today the jurisdictional issue that you raised.

4 THE COURT: All right. So just to make it clear,  
5 within one week of today Akin Gump will brief the transfer  
6 issue with respect to Mansberger, that is, could the Mansberger  
7 action have been brought in California?

8 MR. COHN: Well, I just want to be very clear about  
9 this. The transfer under 1404 implicates issues that are  
10 somewhat different from the CAFA issue as to --

11 THE COURT: Well --

12 MR. COHN: So we can do whatever the Court wants, of  
13 course, but if we are just going to brief the, what's really a  
14 venue question, we can certainly brief that and then brief the  
15 1404 issue after this consolidation issue is resolved.

16 THE COURT: I think that the efficiency of going one  
17 way or the other depends in large part on the likelihood that  
18 the Mansberger action could have been brought in California.

19 If it could not have been brought in California then  
20 we're looking at a different transfer motion from the motion  
21 that you would otherwise file. And so what I have in mind is  
22 that you would brief the narrow issue of whether the Mansberger  
23 action could have been brought in California. The parties will  
24 brief that, if you can, on a one week for a response and then  
25 one week for any defense reply. At that point I'll bring you

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1 back to court and we'll decide where to go from there.

2 MR. COHN: That sounds fine. That's perfect.

3 MR. WELLS: That's fine, your Honor.

4 MR. FOLKENFLIK: Your Honor, obviously, fine. Now.

5 If I could just address a case management issue if it's okay  
6 with your Honor?

7 I had in accordance with your Honor's prior direction  
8 that the parties get together and meet and confer about a  
9 possible sampling procedure, had written on June 18th a lengthy  
10 e-mail to Mr. Knopp who is in California but as I understand  
11 spearheading this litigation for Akin Gump. And I had  
12 suggested a number of things that we sit town and meet and  
13 confer about the issue of possible sampling that we discuss  
14 whether we should limit sampling to New York or go nationwide,  
15 whether we could identify some of the issues your Honor thought  
16 would be helpful to identify.

17 THE COURT: You are asking me now to get involved in  
18 the merits of sampling?

19 MR. FOLKENFLIK: No, not at all. I am just saying I  
20 raised these issue with Akin Gump. They have responded that  
21 they don't want to meet and confer about these processes or any  
22 expedition process until the consolidation in the transfer  
23 motions are first decided. They also have asked that I supply  
24 them with authority that your Honor could order sampling prior  
25 to certification.

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1           My problem with that approach is that your Honor made  
2   crystal clear the desire of the Court to move as expeditiously  
3   as possible. And at some point whether it be from your Honor  
4   or from Magistrate Dolinger we will have to have some  
5   assistance with the Court, I believe, to make that happen.  
6   There are things that can be done today that would expedite  
7   this case.

8           THE COURT: Tell me what could be done today.

9           MR. FOLKENFLIK: We could sit down and meet and confer  
10   about sampling as your Honor directed us to do last time and I  
11   am prepared to do that today.

12           THE COURT: Is there any reason not to do that,  
13   Mr. Cohn?

14           MR. COHN: Yes, your Honor, there are a number of  
15   reasons. And we could not say we are not going to meet and  
16   confer and I have the letter if the Court wants to see that.  
17   We sent to Mr. Folkenflik -- I am sure you don't want to get  
18   into this. Let me just state this. It is our position that  
19   these procedural issues that we have been discussing today  
20   should first be decided by the Court.

21           THE COURT: All right. I disagree with you on that.  
22   I think the case needs to move forward. What we're looking at  
23   is at least a month or two before we know in what district the  
24   cases will lodge eventually.

25           MR. COHN: Right.

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1 THE COURT: The merits of how we deal with  
2 certification should not be put off for two months because of  
3 that. I am directing you to meet and confer.

4 Now is today convenient for you?

5 MR. COHN: It's not.

6 Let me just make one point though, your Honor.

7 Mr. Folkenflik is under an order by a district court in  
8 California to brief the class issue by July 30th without any  
9 sampling and it's his position -- this is the plaintiff's  
10 position --

11 THE COURT: Tell me the bottom line of what you are  
12 upset about.

13 MR. COHN: The bottom line is that Mr. Folkenflik is  
14 now seeking discovery in this court which for whatever the  
15 reasons the plaintiff decided was not appropriate or they  
16 didn't want to pursue in California. It's his burden and he  
17 had a burden under Rule 111 when he filed this lawsuit to make  
18 sure that there was factual support for his nationwide class  
19 claims and it's his position that the discovery which, as you  
20 know, we're now allowing him to use here is sufficient to prove  
21 class treatment in California. And his position is that these  
22 positions are the same throughout the country, California, New  
23 York, Florida. So it's not at all clear to us what additional  
24 information he needs now given the position that he --

25 THE COURT: I'm not going to decide today what he

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1 needs now but I am ordering you to meet and confer and --

2 MR. COHN: Well, we said we would.

3 THE COURT: Tell me how soon you will, a meaningful  
4 meeting.

5 MR. COHN: Yes.

6 (Pause)

7 MR. COHN: We'll be able to do that by the end of next  
8 week.

9 THE COURT: Why don't we say mid week next week?

10 MR. COHN: Isn't that the holiday?

11 THE COURT: No.

12 MR. COHN: Your Honor, I think our office is closed  
13 Monday, although, I'd do it if your Honor chooses.

14 THE COURT: And when I said mid week I ment the 7th or  
15 the 8th.

16 MR. COHN: That's fine.

17 THE COURT: All right. So the meet and confer on  
18 sampling and related issues will occur on or before July 7th  
19 and the parties shall make any motions you deem necessary after  
20 that meeting. I would appreciate your giving me a joint status  
21 letter of the outcome of your meeting with specifics as to what  
22 you did and didn't agree to.

23 All right. Is there anything else today?

24 MR. WELLS: Yes, your Honor.

25 Clearly I don't want my case to be kept in the dark

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1 nor do I want to wait for other issues to develop. So what I  
2 would ask the Court is the discovery that defendants have made  
3 available to Mr. Folkenflik be provided to my office. I  
4 understand --

5 THE COURT: Let me just pause for a minute. I see no  
6 reason why that should not happen.

7 Mr. Cohn?

8 MR. COHN: Well, your Honor, if the two actions are  
9 not ultimately consolidated through class treatment then --

10 THE COURT: That's not an answer. Is there some  
11 reason that the discovery should not be made available to  
12 Mr. Wells under the same conditions that it was made available  
13 to Mr. Folkenflik? Whether it's relevant or not is something  
14 that could be very time consuming --

15 MR. COHN: It will be.

16 THE COURT: -- to ascertain and very expensive for the  
17 parties --

18 MR. COHN: It will be.

19 THE COURT: -- I suggest that unless the material is  
20 subject to some special confidentiality agreement that would  
21 bar Mr. Wells from seeing it that he be permitted to see it  
22 under the same conditions that Mr. Folkenflik was permitted to  
23 see it.

24 MR. WELLS: Your Honor?

25 THE COURT: Please, just a moment.

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1 MR. COHN: So, it would be under the same protective  
2 order that Judge Fogle has entered?

3 THE COURT: Well --

4 MR. COHN: As modified to?

5 THE COURT: It would be under the same conditions that  
6 we all agreed to at the last conference here. I haven't read  
7 the contents of Judge Fogle's order and I am not ruling  
8 anything with respect to what his order says or does and I am  
9 talking about my order.

10 Mr. Wells?

11 MR. WELLS: I'm sorry for interrupting, your Honor.

12 Your Honor, I understand defendant wants to have a  
13 protective order in place. What I was going to suggest is that  
14 they produce all of the documents subject to the treatment of  
15 "attorney's eyes only" until --

16 THE COURT: That is precisely what was agreed to at  
17 our last conference. I would urge you to get a copy of that  
18 transcript when you can.

19 MR. COHN: It's a little different.

20 MR. FOLKENFLIK: Your Honor, I have a copy.

21 THE COURT: Please, counsel, let's not prolong this.  
22 Is there an important difference you want to bring out?

23 MR. COHN: Yes, there is, your Honor.

24 THE COURT: Go ahead.

25 MR. COHN: We don't want to pay to have 50,000 pages

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1 and other materials copied for him. If he wants the  
2 material --

3 THE COURT: We haven't gotten to who is going to pay.

4 MR. COHN: He can get it from Mr. Folkenflik.

5 THE COURT: Well, you haven't even met and conferred  
6 about that, I take it.

7 MR. COHN: We haven't cause this is the first time we'  
8 heard about it.

9 THE COURT: This is not the time to raise it with the  
10 Court. If there is a problem with the cost of copying, let me  
11 know.

12 Thank you, counsel.

13 (Adjourned)

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